STATE OF WISCONSIN CIRCUIT COURT WASHINGTON COUNTY

CHUCK VAN ZEELAND,
VAN ZEELAND OIL CO., INC.,
Plaintiff,

CERTIFICATE OF MAILING

vs.

CASE NO. 00-CV-78

WISCONSIN DEPARTMENT OF COMMERCE,
Defendant,

----------I,

Evelyn Zimpelman, hereby certify that on August 16, 2000, a true and correct copy of the Decision was mailed to:

Attorney Daryl W. Laatsch, 1727 Barton Avenue West Bend, WI 53090;

Assistant Attorney General, Steven Wickland, P. 0. Box 7857, Madison, WI 53707-7857 .

Dated this 16th day of August, 2000.

BY:

Evelyn Zimpelman
Judicial Assistant, Branch I

STATE OF WISCONSIN CIRCUIT COURT WASHINGTON COUNTY

CHUCK VAN ZEELAND
VAN ZEELAND OIL CO INC.,
Plaintiff,

vs.

MEMORANDUM OPINION
CASE NO. 00-CV-78

WISCONSIN DEPARTMENT OF COMMERCE,
Defendant,

The matter before the court is a judicial review of an administrative agency decision.

At the outset it appears that the matter is improperly venued. Normally matters of this type are venued in the Circuit Court for the county in which the petitioner resides. There is nothing in the Petitioner's complaint which indicates venue in Washington County. Section 227.53(l)(a)(3), Wis. Stats., does permit the parties to stipulate, if the court agrees, to venue in a particular county. The court has no objection to having venue remain in Washington County. The court is assuming that there is no objection from either party since no objection was raised by the State in its brief or otherwise.

The facts are not disputed except in one significant regard which will be discussed later. The following description is taken largely from the State's brief and is restated here for the convenience of the parties. Following the removal in 1991 of underground tanks at Van Zeeland Oil Co., Inc. in City of Neenah, soil contamination was discovered. The Petitioner (Van Zeeland) spent $274,260.38 on remediation from 1991 through 1997. Van Zeeland filed a PECFA claim with the Department for reimbursement of eligible costs. On September 24, 1997 the Department found $239,298.50 to be eligible, determining $32,461.88 to be ineligible. Van Zeeland contested the determination resulting in a hearing on November 11, 1998. The principle item in dispute was expenses associated with a soil vapor extraction system (SVE System).

Administrative Law Judge James H. Moe found that the costs for the SVE System were properly denied finding them to be unreasonable and unnecessary under Section 101.143(2)(4)(b), Wis. Stats. A conceded issue and allowance of some claims for

reimbursement lead to a net denial of cost reimbursement in the amount of $22,715.54. It is this particular denial which is subject to appeal.

The factual dispute between the parties relates primarily to the degree of effectiveness of the SVE System. The court also wishes to note at this point that the parties agreed and Administrative Law Judge determined that there was nothing improper or unprofessional in the work done by Cooper. As stated by the hearing examiner "the consultants assessment was performed using the degree of care and skill ordinarily exercised by similar professional consultants in the field. As such, the appellant has established that sound professional judgment was utilized in selecting the SVE System".

STANDARD OF REVIEW

The State correctly points out that Section 227.57, Wis. Stats., sets the scope and standard of review. Subsection (2) provides: "unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agencies action". The court is also required in subsection (3) to separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

The court will further discuss the standard of review as it relates to reviewing the Department's conclusions of law and findings of fact as is appropriate.

The parties fundamentally disagree as to the statutory and administrative code standard to be applied by the Department in determining eligible costs. Section 10.143 (4), Wis. Stats., sets out the requirements to be applied by the Department in awarding costs. Subparagraph (c)4 excludes costs "which the Department determines to be unreasonable or unnecessary to carry out the remedial action activities as specified in the remedial action plan". This is the provision relied upon by the Department in denying Van Zeeland's claim in part. In 1993 a new Administrative Code provision found currently at Comm 47.01 changed the standard to exclude incompetent or noneffective clean up costs. Comm 47.01 adds an exception to the exclusion where the claims were based upon sound, professional and scientific judgment. It is

undisputed in the facts that if this exception to the exclusion were to apply to Van Zeeland's claim that the claim would be allowed. The court's conclusion is based. upon the Administrative Law Judge's clear finding that Cooper's work met professional standards quoted earlier in this decision.

Thus the threshold issue is which cost allowance standard applies to this particular claim. Van Zeeland argues that the Comm 47.01 standard should be applied to the entire claim. Secondly it is argued that the Department erred in applying a PECFA Overview to its interpretation of Section 101.143, Wis. Stats. A PECFA overview is an informal Department interpretation of a statute under its administration. This particular overview determined that costs associated with an inefficient, ineffective or noncost effective clean up action would not be eligible for reimbursement.

A PECFA overview does not have the force of law and is simply an effective way to keep the public notified as to the- Department's interpretation. The fact that the Department issues guidance, such as an overview, is a positive thing and was clearly not intended as an end run around the Administrative Rule making process. The record reflects that the parties are well aware that the state of art in environmental clean up, especially with respect to the PECFA program, was changing rapidly in the early to mid. 90's. As technology changed, consultants, state scientists and policy makers gained a greater understanding of what works and what is cost effective-.

The court agrees with the Administrative Law Judge that PECFA Program overviews are not legally binding but nevertheless, they put parties on notice of the Department's expectation under the statute. The fact that Department decisions are consistent with a PECFA overview is not material. The court is reviewing the Department's decision, not the overview.

The Department determined that Sec. 101.143, Wis. Stats., is the standard to determine costs incurred prior to January 1, 1993. The determination of an appropriate standard in this case is a conclusion of law. There is a certain level of deference that a court must grant an

agency interpreting a statute or Administrative code within its authority. In Sauk County vs. WERC, 165 Wis. 2d 406, 413, 477 N.W. 2d 267 (1991), the Supreme Court determined that in reviewing questions of law three levels of deference are applied to conclusions of law and statutory interpretations in agency decisions. There are great weight deference, due weight deference or no weight, that is, a denovo standard. 'Which standard applies is based upon the expertise of the agency and its specialized knowledge, the experience of the agency in the area, whether it is an.issue of first impression and a number of other factors. With regard to this particular case it is clear that "great weight" deference is required of the court.

Citing Harnischfeger vs. LIRC, 196 Wis. 2d 650, 539 N.W. 2d 98 (1995), the Court of Appeals in Baron Electric Cooperative vs. PSC, 212 Wis. 2d 752, 761, 598 N.W. 2d 767 (Ct. App. 1997) determined that a court should grant great deference to a determination of an agency where 1. “It is charged with administration of statute being interpreted"; 2. Its interpretation “is one of long standing"; 3. It employed "its expertise or specialized knowledge" in arriving at its interpretation; and 4. Its interpretation "will provide uniformity and consistency in the application of the statute". In this particular case all of the standards are met. It is within the special administration of the Department. The Department has clearly employed its expertise or specialized knowledge in this area. The interpretation will provide uniformity and consistency in the application of the statute. No contrary decision of the Department has been cited by the parties.

Again, the Harnischfeger court states a negative test for review of an agency determination under the great weight standard. "An interpretation is unreasonable if it clearly contravenes the words of the statute, is clearly contrary to legislative intent or it is without a rationale -basis.

Two of the Department's interpretations are critical to Van Zeeland's case. The first is the retroactive application of administrative code Comm 47. Citing Modica vs. Verhuist, 195 Wis. 2d 633, 536 N.W. 2d 466 (Ct. App. 1995) the state correctly points that "a statute that prescribes the method for enforcing a right or remedy is procedural; if it creates, defines or

regulates rights or obligations it is substantive". As further indicated in Modica "the general rule of statutory construction is that substantive statutes are to be construed to relating to future and not past acts". Applying the negative test of Harnischfeger, it would be impossible for this court to determine that the Department was unreasonable when it applied the Administrative Code provision prospectively.

The second Department interpretation which is critical to Van Zeeland relates to Sec. 101.143, Wis. Stats. The court could comfortably read "unreasonable" and "unnecessary" to be insufficient to exclude Van Zeeland's claim. It is clear that the technology used in this particular case was well engineered and well considered. It would be possible for a finder of fact to conclude that it was therefore reasonable and necessary. The soil vapor extraction system used was state of the art but simply did not work. It is possible that modifications to the system if approved by the Department would have allowed the system to work, however that is purely speculative. Nevertheless, the Department did not construe the facts and apply the law in this fashion. The fact determination of the Department will be discussed later, however, as determined it is also very clear that this court cannot as a matter of law, conclude that the Department's interpretation was directly contrary to the words of the statute, clearly contrary to legislative intent or without a rationale basis.

It is obvious that the system simply did not work. A policy decision by an agency that remedial measures which are ineffective will not be compensated is certainly reasonable and logical. Neither party has provided any legislative history which would allow the court to conclude that the legislature intended that ineffective measures to be reimbursed. Later adoption of Comm 47 with its more generous provisions probably reflects the Department's experience that some latitude was necessary, but does not allow the court to conclude that the Department's prior interpretation failed to meet the reasonableness test.

With regard to the Department's findings of fact, the facts were not really in dispute except as to the -effectiveness of the SVE system. The petitioner argues that the SVE system was part of a larger system which was effective. Since the Department compensated virtually all of the costs it would be

safe to conclude that the system was largely effective, however the Administrative Law Judge and the Department determined that the SVE system was noneffective. The Administrative Law Judge determined that "no evidence was presented to show that any soil remediation resulted from the SVE system or that it contributed to any reduction in contaminants at the site. There was speculation in the testimony that it may have had some effect, but the Administrative Law Judge and Department were not convinced.

In reviewing findings of fact the courts scope of review is limited. Section 227.57(6), Wis. Stats., states that "if the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside -agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that. is not supported by substantial evidence on the record". Based on the given state of the record there is, substantial evidence by which the Department could conclude that the SVE system was ineffective which would support its conclusion of law.

The exercise of the Department's discretion is subject to the same standard of review applied to discretionary determinations of a trial court. Citing in the matter of the Bar Admission of Altshuler, 171 Wis. 2d 1, 8, 490 N. W. 2d 1 (1992), Martin Transport vs. Hartford Specialty, 191 Wis. 2d 13, 533 N.W. 2d 452 (1995), states that "the court will reverse a discretionary decision of the Circuit Court where the exercise of discretion is based on an error of law (citation omitted). Where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is consistent with the applicable law and one a reasonable judge could reach, the court will affirm the decision even if it is not one which we ourselves would agree". This court cannot substitute its judgment for that of the agency. Based upon the current state of the record it is clear that a reasonable judge, in this case the Department, could consider the facts and reason its way to the conclusion made by the Department in this particular case. Although there is substantial merit to Van Zeeland's contention that the costs were not unreasonable and unnecessary because they were part of a greater whole and based upon sound engineering

judgment, in fact that was not the determination of the Department and the Department's interpretation was certainly reasonable.

In summary then it is clear that the Department's finding of fact and conclusions of law met the appropriate standard. It is also clear that where its discretion was exercised it was exercised reasonably and that this court would have to substitute its judgment for the Department in order to reach any contrary conclusion. The Department's reliance on an overview, even if it did rely, is not material. The decision of the Department is therefore affirmed. The State is directed to prepare an appropriate judgment for the court's approval.

Dated this 15th day of August, 2000.

BY THE COURT

Hon. Patrick J. Faragher
Court Judge, Branch I
Washington County Courthouse